# STATE OF MICHIGAN

# COURT OF APPEALS

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| SHERRY LYN HARRINGTON,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 7, 2000 |
| v | No. 219198<br>Ingham Circuit Court<br>Family Division |
| MARK ALLEN HARRINGTON,<br><br>Defendant-Appellant. | LC No. 98-003804 TM |

Before: Talbot, P.J., and Gribbs and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from an order changing custody of the parties' daughter to plaintiff. We affirm.

Defendant first argues that the trial court erred in denying his motion to change venue from Ingham County to Muskegon County. We disagree.

The denial of a motion for change of venue is reviewed under the clearly erroneous standard. *Vermilya v Carter Crompton Site Development Contractors, Inc*, 201 Mich App 467, 471; 506 NW2d 580 (1993). A finding is clearly erroneous if the reviewing court, based on all the evidence, is left with a definite and firm conviction that a mistake has been made. *Port Huron v Amoco Oil Co*, 229 Mich App 616, 636; 583 NW2d 215 (1998).

MCR 3.204(A) provides that an action under the Child Custody Act, MCL 722.21 *et seq*.; MSA 25.312(1) *et seq*., must be filed in the circuit court for the "county in which the minor resides." Venue is determined at the time an action is filed. *Omne Financial, Inc v Shacks Inc*, 226 Mich App 397, 405; 573 NW2d 641 (1997); *Kubiak v Steen*, 51 Mich App 408, 411-414; 215 NW2d 195 (1974). The crux of defendant's argument is that a child cannot have a domicile separate from her parents, and therefore the time when the child was living in Lansing with defendant's friends should have been treated as time during which she resided in Muskegon County, where her father was incarcerated. In *Kubiak*, *supra* at 413, this Court rejected the proposition that a minor automatically has the same residence or domicile as her parents. Moreover, this Court distinguished the term "reside" as used in

the Child Custody Act, MCL 722.21 *et seq*.; MSA 25.312(1) *et seq*., from the concept of "domicile," and held that courts should focus on the place where the minor actually lives. *Id*. at 413-414.

In the present case, defendant testified that his incarceration ended on June 16, 1998. Defense counsel represented that defendant took the child from his friends' house to Muskegon the same day. Plaintiff filed her complaint on the morning of June 17, 1998, at a time in which the child would likely have been in Muskegon County for less than a day. These facts support the trial court's finding that the child had not yet established a residence in Muskegon County. We find that the trial court did not clearly err in finding that venue was proper in Ingham County.

Defendant next argues that the trial court erred in not finding that the child's established custodial environment was with defendant. We find no error.

In a child custody case, we review the trial court's findings of fact under the "great weight of the evidence" standard, the court's discretionary rulings for an abuse of discretion, and questions of law under the clearly erroneous standard. MCL 722.28; MSA 25.312(8); *McCain v McCain*, 229 Mich App 123, 125; 580 NW2d 485 (1998). A trial court's findings regarding the existence of an established custodial environment and with respect to each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994); *Ireland v Smith*, 214 Mich App 235, 242; 542 NW2d 344 (1995).

The criteria for determining a child's best interests in a child custody case are contained in MCL 722.23; MSA 25.312(3). However, whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child's best interests. *Overall v Overall*, 203 Mich App 450, 455; 512 NW2d 851 (1994). The court must make a specific finding regarding the existence of a custodial environment. If the court fails to do so, this Court will remand for such a finding. *Underwood v Underwood*, 163 Mich App 383, 389; 414 NW2d 171 (1987).[1]

Defendant claims that the trial court erred because the testimony at trial clearly established the existence of an established custodial environment. The trial court found:

> First, I find that this child has not lived in a stable, satisfactory environment in years. It is undisputed that her father moved approximately 18 times. It is undisputed that her father went to – I believe it was prison and then a halfway house, and left the child with persons who were unrelated to her during the time he was incarcerated without notifying her mother. I would have to be a complete idiot to declare that as a stable and satisfactory environment, therefore, I must consider the child custody factors.
>
> First, let me comment that I found the Defendant's testimony highly uncredible. He rationalized everything that he did, his criminal convictions, the hiding of the latest convictions from the child's mother, the hiding of the child's whereabouts from the child's mother, and his bounding around the country in short-term domiciles that, that this was in the best interest of this child, and he continues to rationalize that it was in the

best interests of the child despite the reports of psychologists and other qualified people who made it clear that this child had some problems that really needed attention.

Defendant further submits that the court erred in finding the absence of a "stable, satisfactory environment" because the statute requires a determination regarding an "established custodial environment."

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is marked by security, stability, and permanence. *DeVries v DeVries*, 163 Mich App 266, 271; 413 NW2d 764 (1987); *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981). Here, the trial court found the relationship between defendant and the child to be lacking in security, stability, and permanence. Although the trial court failed to incorporate the specific phrase "established custodial environment" into its analysis, any error with regard to this semantic oversight was harmless[2] – the trial court found the stability of the child's environment lacking in several respects.

The testimony at trial revealed that since the parties' divorce, the child attended at least eight different schools. Defendant and the child lived in as many as nineteen residences. During this time, the child experienced social and behavioral problems. Defendant had two drug-related criminal convictions while the child was in his custody, and he left her with two people to whom she was not related. Defendant never informed plaintiff of the child's whereabouts during his incarceration. In light of these facts, and the trial court's finding that defendant was not a credible witness, we cannot say that the evidence before the court preponderated in defendant's direction. The trial court did not err in determining that no established custodial environment existed.

Defendant's final argument is that the trial court erred in finding that a change in custody would best serve the child's interests. We find this argument to be without merit.

The abuse of discretion standard applies to the trial court's decision regarding to whom custody should be granted. *Fletcher*, *supra* at 879-880; *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 24; 581 NW2d 11 (1998). An abuse of discretion occurs when the result is so grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment or the exercise of passion or bias. *Fletcher*, *supra* at 879-880 (Brickley, J.).

MCL 722.23; MSA 25.312(3) lists the criteria necessary to determine a child's best interests in a custody case. In evaluating factor (a) the trial court found that love, affection, and other emotional ties between the child and each parent was equal. According to the court, factor (b) ("[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any") weighed in favor of plaintiff, based on the fact that defendant placed the child with unrelated persons, rather than her mother, during his incarceration. The trial court correctly concluded that this indicated that defendant's spite prevailed above all other considerations.

Factor (c) ("[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs") went equally to both plaintiff and defendant. The court properly found that factor (d) weighed in favor of plaintiff, based on the court's earlier finding that defendant did not provide the child with a stable, satisfactory environment.

The court found that factor (e) ("[t]he permanence, as a family unit, of the existing or proposed custodial home or homes") weighed in favor of plaintiff because plaintiff had established a long-term trend toward stability, whereas defendant had not provided a permanent home in the prior three to four years. In light of defendant's several convictions, including his drug convictions in 1997the trial court found that factor (f) ("moral fitness") also favored plaintiff. The record supports the trial court's findings and we cannot say the evidence clearly preponderates in the opposite direction. *Fletcher, supra*.

The court decided that factor (g) ("mental and physical health of the parties involved") weighed equally in favor of both parties. The court determined that factor (h) ("the home, school, and community record of the child") weighed in favor of plaintiff, because the child was not doing well under the custody arrangement with defendant, as evidenced by her emotional and social difficulties. Again, these findings were supported by the evidence before the court.

The court was convinced that factor (i) ("the reasonable preference of the child") should be decided in favor of plaintiff. The court had earlier informed defendant that if he failed to produce the child before the court, then the court would assume that she would have testified against defendant. The court expressly found that the child was of sufficient age to express a preference, and found that she would have preferred to live with her mother. Factor (j) ("[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents") also favored plaintiff based on defendant's decision not to disclose the child's whereabouts during his incarceration. The court expressed some concerns regarding plaintiff's efforts to maintain a relationship with the child while defendant had custody, but felt that she should receive the overall advantage on factor (j). We find no error in these determinations.

Finally, the court found that neither party had committed domestic violence against the child, and therefore gave equal weight to each parent with respect to factor (k) ("[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child"). The last factor, (l) (any other factor considered relevant to the court), also favored plaintiff after the court considered a Friend of the Court recommendation for change of custody.

Because the court found that no established custodial environment existed, plaintiff needed only to prove her case by a preponderance of the evidence. *Hayes v Hayes*, 209 Mich App 385, 387; 532 NW2d 190 (1995). A trial court, while considering the criteria of MCL 722.23; MSA 25.312(3), need not give each factor equal weight, *McCain, supra* at 131, but must make specific findings of fact and conclusions of law on each factor, *Meyer v Meyer*, 153 Mich App 419, 426; 395 NW2d 65 (1986). In the present case, eight of the twelve factors weighed in plaintiff's favor. The court did not decide any of the factors in favor of defendant. The court appropriately made a straightforward, step-by-step analysis of the various factors, and its findings were based on the information adduced at trial.

The court's findings of fact were not against the weight of the evidence, nor was its ultimate weighing of the factors in favor of plaintiff an abuse of discretion.

Affirmed.

/s/ Michael J. Talbot
/s/ Roman S. Gribbs
/s/ Patrick M. Meter

[1] In *Underwood*, *supra* at 389, this Court exercised de novo review to determine whether an established custodial environment existed. Defendant urges us to do the same in this case. However, Michigan appellate courts no longer review custody orders de novo. *Fletcher*, *supra* at 882; *Ireland*, *supra* at 247.

[2] Harmless error in a child custody dispute does not require reversal. *Fletcher*, *supra* at 889.